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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILLIAM E. ADDISON, ET AL.,
Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

ELLIS F. DAVIS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 217

WILLIAM E. ADDISON, ET AL.,
Petitioners,

vs.

HOLLY HILL FRUIT PRODUCTS, INC.

BRIEF OF PETITIONERS ON CERTIORARI GRANTED.

I.

Official Report of the Opinion Rendered in the Circuit Court of Appeals, Fifth Circuit.

Petition for certiorari was presented to this Court at this Term, and granted on October 11, 1943.

This case was decided on June 24, 1943, by the Circuit Court of Appeals for the Fifth Circuit, on appeal from a judgment of the United States District Court for the Southern District of Florida. The decision of the Court of Appeals is reported as *Holly Hill Fruit Products, Inc.*, vs. *Wilma E. Addison, et al.*, C.C.A., Fifth Circuit, 136 Fed. (2nd) 323, Advance Sheet No. 2, Opinions by Holmes and Waller, Circuit Judges.

II.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The decision of the Court of Appeals reversed a judgment in favor of plaintiffs in an action to recover under the wage and hour provisions of the Fair Labor Standards Act of 1938, Chapter 676, 3rd session, 15th Congress, 52 Statutes 1060; 29 U. S. Code, Section 201, et seq. The problem presented is the validity or invalidity of regulations promulgated by the Administrator of the Wage and Hour Division of the Department of Labor, acting under legislative direction to define the phrase "area of production," as applicable to the exemption contained in Section 13 (a) (10) of the Act. (U. S. Code, Title 29, Section 213 (a) (10)).

Jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925. 43 Statutes 938; U. S. Code, Title 28, Section 347. Jurisdiction of the District Court is to be found in Section 24 of the Judicial Code as amended. U. S. Code, Title 28, Section 41.

III.

Statement of the Case.

Act of Congress Involved.

L. Five named employees of defendant's citrus canning establishment, as individuals and as agents and representatives of other named employees, filed their complaint against defendant for underpay and overtime compensation, liquidated damages, attorneys' fees and costs under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 et seq.) 52 Statutes 1060.

Exception in Statute Relied Upon by Defendant.

The defendant, in its amended Fifth Defense (R. 13-23) which the Court of Appeals held good (R. 228), all other defenses being eliminated, relies upon the defense that plaintiffs are excepted from the coverage of the minimum wage and maximum hour provisions of the Act by Section 13 (a) (10) of the cited Act because employed within the "'area of production' (as defined by the Administrator)", and engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state or canning of agricultural or horticultural commodities for market.

Proceedings in the Case.

The plaintiffs sought recovery of defendant on account of minimum wages and overtime earned as employees of defendant during the citrus canning seasons of 1938-1939, and 1939-1940 in the citrus fruit canning establishment operated and maintained by respondent in the town of Davenport, Polk County, Florida. Some of the plaintiffs were hour hands, and some were piece workers. Defendant in the District Court, claimed total exemption from the minimum wage and maximum hour provisions of the Act, under said Section 13 (a) (10) of the Act as well as two cumulative partial exemptions, from overtime, under Sections 7 (b) (3) and 7 (c) of the Act.

As the result of a trial, the District Court made written findings of fact and conclusions of law, disallowed each of the claims of total and partial exemption, and entered a separate judgment in favor of the hour hands, allowing them both minimum wages and overtime according to the proof of their several claims. (Rule 54-B, Federal Rules of Civil Procedure, Reeves vs. Beardall; 316 U. S., 283; 86 L. Ed. 1478).

On appeal by defendant, the Court of Appeals (5 Ct.) reversed the District Court, holding void the limitation in the regulation as to the number of employees, and, conceding without deciding, that the remaining portion of the regulation is valid, concluded that these appellees (petitioners here) were employed within the "area of production" during the entire period involved here, and that the minimum wage and maximum hour provision of the Act did not apply to them (R. 228).

Upon plaintiffs' petition for certiorari, supported by Brief of the Solicitor General of the United States as *amicus curiae*, the Supreme Court granted certiorari.

Facts as Found by the District Court.

The findings of the district court included the following facts:

The defendant was engaged in canning fruit during the period from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187), and throughout said two seasonal periods of operation, defendant employed at its establishment in the town of Davenport, Polk County, Florida, in its citrus fruit canning operations and processes, more than two hundred "piece workers" (R. 187) and forty-seven "hour hands" (R. 213). Said town is a town of six hundred and fifty population according to the 15th United States Census, 1930, situated within four miles of an incorporated town, Haines City, in said County, which had a population of over three thousand persons according to both the 15th Census of 1930, and the 16th Census of 1940 (R. 187).

During the first of these two periods, by regulation promulgated October 20, 1938, the Administrator of the Wage & Hour Division of the Department of Labor defined an individual as employed in the "area of production" if en-

gaged in such work on a farm, and on agricultural or horticultural commodities produced exclusively on such farm, or if such commodities are obtained by the establishment where he is employed from farms in the immediate locality, and the number of employees in such establishment does not exceed seven (R. 187 and 188). This regulation remained in effect through April, 1939, when, following a series of administrative hearings, the Administrator added a paragraph to his said definition as follows: "(e) With respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th U. S. Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles." (R. 187-188).

On June 15, 1939, effective June 17, 1939, the Administrator again amended his definition aforesaid to provide that the individual shall be regarded as employed in the "area of production" (a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or * * * (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed, and the establishment is located in the open country or in a rural community. As used in this sub-section (d) "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of

2,500 or greater population according to the 15th United States Census, 1940" (R. 188-189).

The District Court further found:

"VII. In and throughout the said two seasonal periods of operation, the establishment of the defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the 'immediate locality' or 'general vicinity' of the said establishment as defined by the Administrator. An appreciable portion thereof came from a distance beyond the range of usual farm travel. The general vicinity of defendant's establishment was not sparsely settled, there being several towns and communities within a radius of less than ten miles. Thus, considerable fruit was canned and processed in the defendant's establishment during said season which came from the neighborhood of Haines City, which is within four miles, and has several commercial canning plants operating in competition to defendant's establishment. Also considerable fruit was canned and processed in the defendant's establishment during the season in controversy, coming from the neighborhood of communities as far away from Davenport as Lake Wales —20 miles—Babson Park, several miles more than 20, Dundee 14 miles, Loughman 7 or 8 miles. Much of this fruit was hauled past other canning factories to reach the defendant's establishment" (R. 192).

"VII. In and during said two seasonal periods of operation, the establishment of the defendant is not located in the 'open country' or a 'rural community', as defined by the Administrator in his said several definitions, because there was within the range of usual farm travel, at a point not more than four miles away, a town of more than 2,500 population according to the applicable United States Census" (R. 192-3).

"IX. There was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment; almost all of the testimony on the distance of the point of original of the commodities processed by said establishment during said two seasonal periods had reference to a ten mile radius, 'as the crow flies'" (R. 193).

"X. The evidence discloses that the defendant is not an establishment operated by the farmers raising the commodities processed, and that the processing is not done by the farmers through the use of their own farm labor on their own farms. On the contrary, although its membership consisted of fruit growers owning groves in two certain townships in Polk County, Florida, the defendant accepted a considerable portion of its commodities from groves of non-members and, in fact, processed many thousands of boxes of fruit delivered to the canning plant by a speculative non-member, the Grapefruit Distributors, Inc., a corporation. The employees of the defendant were not hired by the members, nor were they farm labor. On the contrary, they were hired by the defendant corporation and did no farm or agricultural labor. They were simply industrial employees. The defendant corporation was not itself engaged in agricultural or horticultural labor or work. It was a commercial industrial concern entitled to earn a reasonable profit from canning fruit" (R. 193).

The District Court concluded that the total exemption from the minimum wages and maximum hours provisions of the Act intended by Section 13 (a) (10) U. S. C. A. Sec. 213 (a) (10) of the Fair Labor Standards Act of 1939 was inapplicable to the defendant (R. 194-197).

Determination of the Circuit Court of Appeals, Fifth Circuit.

On appeal taken by the defendant, the Circuit Court of Appeals for the Fifth Circuit, found:

Defendant admits that the wage and hour requirements of the Act were not observed by the defendant's establishment (R. 225).

As to the period from November 14, 1938 to April 19, 1939 the Court, on authority of its earlier decision in *Fleming* v. *Farmers Peanut Company*, 128 Fed. 2d, 404, held "that the limitation in the regulation as to the number of employees working together in the establishment had no relation to area of production and was void," and "conceding without deciding that the remaining portion of the regulation is valid," the evidence showed that 97.24% of the commodities came from farms located within 10 miles, 96/100 of 1% could not be traced, and the balance came from farms less than 25 miles distant, and that "it would be most unreasonable to say that the negligible quantity obtained from a slightly greater distance should effect the statutory concept of "area of production" (R. 226).

As to the period from April 30, 1939 to May 26, 1939, the Court of Appeals held that the evidence showed that "more than 97% of the commodities processed came from farms located within 10 miles of the plant. • • • The purchase of so great a portion within a ten mile radius of the plant, and the acquisition of the negligible balance from farms within 25 miles were sufficient to prove that the products were obtained within the immediate locality" (R. 226-7).

As to the period from November 16, 1939 to March 30, 1940, the Court said: "Again, on the authority of *Fleming* v. *Farmers Peanut Co., supra*, we disregard as void the limitation with respect to the number of employees, and consider only whether the fruits processed came from

within the general vicinity of the establishment. During this period, 91.39 per cent of the fruit processed was purchased from farms within 10 miles of the plant, and an additional 4 per cent from farms within 25 miles; none was known to have come from any greater distance. In ordinary usage, the words *general vicinity* indicate a larger area than is meant by *immediate locality*, and a distance of 25 miles in this day of highly developed travel facilities is not beyond the range of usual farm travel".

IV.

Specification of Error.

The Court of Appeals erred in invalidating the Administrator's definition of "area of production" because the said definition was within the standards set up by Congress for the guidance of the said Administrator and a reasonable exercise of the authority delegated to the Administrator by Congress to define said phrase.

V.

Argument.

The Exemption Claimed.

Section 13—(a) The provisions of Sections 6 and 7 shall not apply with respect to: * * * (10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market.

29 U. S. C. A., Section 213 (a) (10).

The Administrator's Three Definitions Applicable to the Citrus Fruit Seasons of 1938-1939 and 1939-1940.

We quote from the District Court's findings of January 26, 1943 (R. 187-189), dealing with the Fifth Defense as

amended (R. 13), the Administrator's three definitions of the phrase "area of production" applicable to our controversy.

VI. The Wage and Hour Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

"Section 536.2. 'Area of Production.' As used in Section 13 (a) (10) of The Fair Labor Standards Act, an individual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(a) If he is engaged in such work on a farm and on agricultural or horticultural commodities, produced exclusively on such farm, or

(b) If the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven."

That regulation remained in effect through April, 1939, when, following a series of Administrative hearings, he promulgated, effective April 30, 1939, an additional paragraph to said Regulation 536.2, as follows:

"(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this sub-section (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or

greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 15 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(a) if he performs these operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

* * * * * * *

(d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this sub-section (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th United States Census, 1940."

(Quoted from order of January 26, 1943, on issues raised by the amended Fifth Defense (R. 187 to 189).)

THE DEFENDANT HAD THE BURDEN OF PROVING ITS CLAIM FOR EXEMPTION.

The burden of proving the applicability of an exemption rests upon the party pleading it: *Thompson* v. *United*

States, 258 Fed. 196 (C. C. A. 8), cert. denied, 251 U. S. 553; *United States* v. *Dickson*, 40 U. S. (15 Pet.) 141, 165; *Spokane & Inland R. Co.* v. *United States*, 241 U. S. 344, 350, and *Walling* v. *Home Loose Leaf Tobacco Co.*, conclusion of law No. VII.

The defendant assumed that burden and produced evidence for the purpose of establishing its claim to exemption under Section 13 (a) (10) of the Act. We submit that the evidence adduced was, for the reasons hereafter pointed out, insufficient, and failed to establish defendant's said claim to exemption.

IF THE ADMINISTRATOR'S DEFINITIONS ARE VALID THE EVIDENCE DOES NOT SUSTAIN DEFENDANT'S CLAIM FOR EXEMPTION.

On the point as to the number of defendant's employees the evidence adduced shows:

During the seasons in controversy, the defendant employed some forty-seven hour hands and 200 piece workers (R. 148-150 & 213-4).

On the point of the applicability of the said exemption with relation to whether the agricultural or horticultural commodities were obtained from the "immediate locality" or "general vicinity", the evidence presents a total failure to establish what amount of fruit came from within a distance of more than 10 miles of defendant's establishment. All the proof submitted by defendant related to a 10 mile *radius* distance as distinguished from road haul distance. The percentages given by the Court of Appeals, based on the calculations filed in evidence by defendant (R. 180-4) had reference to radius distance (R. 193).

The evidence offered by defendant on the point of origin of the fruit processed was in fact hopelessly vague and inconclusive. Thus:

The witness J. A. Langley (R. 71-72), asked about the fruit which he sold to defendant, answered:

"You sold it to them?

"A. Yes.

"Q. What groves did it come from?

"A. Well, I could hardly tell you. In my own groves —other people's; I don't have any record.

"Q. Were those groves in the Haines City territory this fruit came from?

"A. Most of them were; one probably wasn't.

"Q. Which one?

"A. The one at Hesperides.

"Q. How much came from Hesperides?

"A. Well, I could hardly say how many boxes. I didn't keep a record."

The defendant's witness, Weatherford did not know from what groves the fruit he hauled to the defendant's establishment came (R. 60-61). The defendant's witness Cook had lost his records and has no real memory of the location of the groves whence the fruit he hauled to defendant's establishment came from (R. 44-46). Yet the percentage calculations made by Mr. Hickman, the treasurer of defendant-company, and relied upon by the Court of Appeals was based on the unreliable recollection of these two witnesses (R. 136-138). The treasurer admits that if the defendant's witnesses Cook and Weatherford erred in their memories, his own percentage calculations cannot be relied upon (R. 137). Moreover, these very calculations (R. 180-4) show that in the 1939 season the percentage of speculative fruit purchases made by defendant's establishment, through its subsidiary Grapefruit Distributors Inc. (R. 128 and 140) was 18.74 per cent of the total volume of fruit processed and, in the 1939-40 season, 29.09 per cent of the total volume of fruit processed (R. 180).

Defendant's treasurer admits that this fruit bought by the officers of the defendant for speculative purposes under

the name of Grapefruit Distributors Inc., and processed through the defendant's establishment was bought hither and yon (R. 135), regardless of the distance from the defendant's establishment. The calculations filed by the treasurer (R. 180-4) and relied upon by the Court of Appeals are all out of focus because the treasurer does not know from what groves or what distance this fruit came (R. 138).

It was in the light of this inconclusive and disputed evidence that the District Court found that "defendant did not obtain all of its agricultural and horticultural commodities or materials from farms in the 'immediate locality' or 'general vicinity' of the said establishment as defined by the Administrator" (R. 192), and that "there was practically no testimony showing the percentage of the fruit processed by the defendant establishment which was procured from groves located at a distance of more than ten miles by the shortest road haul from the establishment" (R. 193).

In view of the fact that the trial judge saw the witnesses and heard the evidence and found as stated, and in view of the principle that the burden of proving the applicability of an exemption rests on the party pleading it, the Court of Appeals was clearly in error in reaching different factual findings and conclusions from those of the District Judge. Yet, without these factual misconclusions, there is no logical basis for the decision of the Court of Appeals.

Summary of Argument

Plaintiffs sued for wages due them under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 et seq.). The defendant claimed exemption under Section 13 (a) (10) of the Act but admitted inability to qualify for the exemption under the Administrator's three definitions of the phrase "area of production" applicable to the periods in con-

troversy. It, therefore, argued to the District Court that the Administrator's definitions are invalid, but that, under any reasonable definition of the phrase "area of production," it was entitled to the exemption, and undertook to show by evidence that the fruit processed came from the general vicinity of its establishment. The District Court ruled the Administrator's definitions were valid, that if the Administrator's definitions were invalid, no exemption existed, and that an appreciable portion of the fruit processed by defendant came from "beyond the range of usual farm travel" and that, therefore, for all three reasons, the defendant was not entitled to its claimed exemption. In the Court of Appeals the defendant relied upon the decision of the C. C. A. 5th Circuit in *Fleming* v. *Farmers Peanut Company*, 128 F. (2d) 404, which discarded the number factor of the Administrator's definitions and then, further discarding the space limitations in the Administrator's subphrases "immediate locality" and "general vicinity" held that the commodities processed by the Farmers Peanut Company came from within the usual range of farm travel and, therefore, were within the "general vicinity" of its establishment and allowed the exemption. Although the District Judge had found, in our case, that an appreciable portion of the fruit processed came from beyond the range of usual farm travel, the Court of Appeals held, *on the authority of the Farmers Peanut case, supra*, which limited "general vicinity" to "the range of usual farm travel," that defendant was entitled to the exemption.

We contend:

I.

The defendant did not by the evidence it offered in the District Court, establish its right to the exemption it claims, either by the Administrator's definition of "area of production" or that of the CCA, 5th Circuit, in the *Farmers*

Peanut Company case, supra, because its evidence showed that an appreciable portion of the fruit processed at its plant came from beyond the usual range of farm travel.

II.

A. The Administrator's definitions are severally valid as well as to number factor as to their space and population requirements. Since it is conceded that the defendant's establishment does not procure all of the fruit processed from the "area of production" as so defined the defendant is not entitled to the claimed exemption.

B. The Administrator's definitions are valid because:

1. The delegation by the Congress to the Administrator of the power to define the phrase "area of production" was constitutional and set up sufficient standards for his guidance.

2. The Administrator exercised his said delegated power according to said standards. Thus:

(a) The Administrator tried to define the phrase so as to carry out the purpose of the Act as such purpose is set forth in the Act and as it was disclosed by the debates in Congress on the bill that became the Act.

(b) The Administrator held hearings, and gave notices, and considered objections.

(c) The Administrator arrived at his definitions in a reasoned and logical manner.

III.

A. If the Administrator's definitions are not valid, the defendant cannot claim the exemption because:

1. The right to the exemption is dependent on the Administrator's proper execution of the power delegated to

him by Congress to define the same by defining "area of production".

2. The Courts cannot, by defining the phrase for the Administrator, exercise the power delegated by the Congress exclusively to the Administrator.

IV.

A. The Court of Appeals erred in invalidating the Administrator's definition because in doing so:

1. The said Court exceeded its proper function of review of the Administrator's regulation.

2. The said Court either

(a) Overlooked its own holding in the *Farmers Peanut Company* case, supra, that "general vicinity" does not include a distance beyond the range of usual farm travel, or

(b) Improperly overruled the finding of fact by the District Judge that an appreciable portion of the fruit processed at the defendant's establishment came from beyond the range of usual farm travel. (R. 192)

V.

A. The defendant is not entitled to either of its two claims of partial exemption each of 14 weeks in each calendar year under Sections 7 (b) (3) and 7 (c) of the Act because:

1. The district judge so found and the Court of Appeals did not disturb the finding.

2. The Administrator is authorized by Section 7(b)(3) of the Act to determine what is an industry of a seasonal nature, just as he is authorized by section 13(a)(10) to define "area of production".

3. Application of the Section 7(b)(3) exemption depends upon a prior determination by the Administrator of the *seasonality* of the industry, and such determination was

made by the Administrator with respect to the operations performed by respondent only effective August 24, 1940.

GENERAL DISCUSSION OF THE THREE DEFINITIONS BY THE ADMINISTRATOR EFFECTIVE DURING THE PERIOD INVOLVED IN THIS CONTROVERSY.

Three times within the period or periods here involved, November 14, 1938 to May 26, 1939, and November 16, 1939 to March 30, 1940 (R. 187), the regulation was amended. In each instance the elements of distance and number of workers employed appear. In its ruling the Court of Appeals failed to recognize the significance of the latter element of the administrative definition.

In each of the Administrator's definitions of the term "area of production" here involved we find: (1) The number of employees in such establishment shall not exceed seven (R. 188). (2) All of the agricultural and horticultural commodities processed by the company must be obtained by the defendant company from farms in the "immediate locality" or "general vicinity", these sub-phrases being defined as not to include any distance of more than ten miles (R. 188). (3) The establishment of defendant must be located in the "open country" or in a "rural community"; these sub-phrases being defined so as not to include any city or town of 2,500 or greater population.

The Act has devolved upon the Administrator the duty of working out administrative regulations and orders necessary or appropriate to make effective its benefits throughout the entire industrial area of the United States. Its guiding lights are set in the declaration of purpose above mentioned and in the definitions and exemptions found respectively in the 3rd and 13th Sections of the Act.

The "area of production" is not readily, or perhaps even appropriately to be defined by miles, although convenience of transportation may be one element to be considered in

looking for convenient means of determining the area contemplated as indicated by the statute's manifest purpose and intent to recognize the essential difference between the conditions under which agricultural labor is performed and those surrounding industrial employment.

Workers in a neighborhood packing house, serving farms and groves within convenient hauling distance and employing a limited number of men and women, are more closely related to the farm or grove, both in point of interest and in point of economic requirement, than the workers in a great plant in a distant town or city supplying its seasonal requirements of labor from those to be found in town or city. The workers in the neighborhood plant have mutual social interests. Their children attend the same school, and when the radio reports an impending subnormal temperature they join in the all-night vigil required to keep burning the fires and smudges used in protecting the fruit on the trees from the cold.

The ascertaining of the limits of the "area of production" was properly committed to the administrative agency.

Opp Cotton Mills v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126, 85 L. Ed. 624; and

United States v. *Darby*, 312 U. S. 100, 85 L. Ed. 609.

"It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made."

Federal Security Administrator v. *Quaker Oats Company*, 318 U. S. 218; 87 L. Ed. Adv. Sheets, page 540; Opinion by Chief Justice Stone.

In its recent decisions, the Supreme Court has re-emphasized these principles. *Gray* v. *Powell*, 314 U. S. 402; *Federal Security Admr.* v. *Quaker Oats Corp.*, 318 U. S. 218. In the latter case the Court emphasized the broad "scope that must be allowed to the discretion and informed judgment of an expert administrative body."

The Courts have repeatedly approved the principle that determinations of an administrative agency will not be disturbed unless clearly arbitrary or capricious. *Gray* v. *Powell*, 314 U. S. 492; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *I. C. C.* v. *Union Pacific R. R. Co.*, 224 U. S. 541; *Manufacturers Ry.* v. *United States*, 246 U. S. 658; *Utah Copper* v. *Railroad Retirement Board*, 129 F. (2d) 358, 361 (C. C. A. 10) cert. denied, 317 U. S. 687. In adopting this principle the Supreme Court has said that the judiciary "will not consider the expediency or wisdom of the order, or whether on like testimony it would have made a similar ruling." *I. C. C.* v. *Union Pacific R. R. Co.*, *supra*, 547; *Pacific States Box & Basket Co.* v. *White*, *supra*, at p. 182. Because of the "strength due to the judgments of a tribunal appointed by law and informed by experience" (*Illinois Cent. R. R. Co.* v. *Interstate Comm.*, 206 U. S. 441, 454), its conclusions "will not be disturbed save as in particular instances they are plainly shown to be overborne." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 54. Consequently, "a rule or regulation promulgated by an administrative agency charged with the administration of an act has the force and effect of law if it is reasonably adapted to the administration of the act and does not contravene some statutory provision." *United States* v. *Standard Crude Oil Purchasing Co.*, 113 F. (2d) 194, 201 (C. C. A. 10).

As expressed long ago in *Boske* v. *Comingore,* 177 U. S. 459, 470:

> "Those who insist that such a regulation is invalid must make its validity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

As stated by Mr. Chief Justice Marshall in *Wayman* v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253 at 263, Congress may certainly delegate to others powers that the legislature may rightfully exercise itself. As Mr. Justice Harlan said in the case of *Field* v. *Clark,* 143 U. S. 649, 36 L. Ed. 294 (1891), while Congress cannot delegate the power to make a law, it can confer authority or discretion as to its execution. As stated by Mr. Justice Brandeis in his opinion, in the case of *Pacific States Companies* v. *White,* 296 U. S. 176 (1936), where a regulation is within the scope of authority legally delegated, a presumption of the existence of facts, justifying its specific exercise attaches to the orders of Administrative bodies. The mode of determination of facts being within its control, Congress may reserve to itself the power of determination, or may delegate that power to administrative agencies, Federal Administrative Law, Vom Baur, Volume 1, page 11. The Constitution does not deny Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules, within prescribed limits, and the determination of facts to which the policy, as declared by the legislature is to apply, Vom Baur 1, Opus cit., page 21. Congress may validly delegate the determination of facts,

not necessarily the subject of judicial cognizance, to which a declared policy, standard, or rule of conduct applies, to an administrative agency, Vom Baur 1, Opus cit., page 26.

The Fair Labor Standards Act is remedial and must be liberally construed to effectuate its purposes. *Missel* v. *Overnight Motor Transportation Co.*, 126 F. (2nd) 98, 103, affirmed 316 U. S. 572; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56. The same liberality of construction should be applied to the regulations promulgated to effectuate the act. *Ralph Knight, Inc.*, v. *Mantel*, 135 F. (2d) 514, 517. The exemptions must be strictly construed. *International Longshoremen's Association* v. *National Terminals Corp.*, 50 Fed. Suppl. 26, 27; *Fleming* v. *Hawkeye Pearl Button Co., supra.*

Debates in Congress.

Whatever may be the right of the courts to take judicial notice of the debates in Congress, it surely is axiomatic that the Administrator specifically charged by the Congress with the carrying out the will of Congress as to an exemption by defining the governing phrase limiting the exemptions may consult such debates. He did so.

Since the legislate history in both the Senate and the House is inconclusive, it will be discussed only briefly.

Congress enacted the Fair Labor Standards Act of 1938 to correct sub-standard labor conditions with regard to the wages and hours of industrial labor. The Congress left it to the Administrator in defining the phrase "area of production" to carry out the purpose of Congress as set forth in Section 2 of the Act to correct the sub-standard labor conditions at which the Act was aimed. From the debates it seems that the main directive by Congress to the Administrator to be deduced from the debates seems to have been to include all industrial labor and exclude labor employed in small neighborhood farm processing plants where the farm-

ers processed their own products and those of their farming neighbors. It was the evident intention of Congress in drafting the Section 13 (a) (10) exemption to draw a line of demarcation between farm and industrial labor. In the Senate this was the purpose of the Schwellenbach amendment exempting the "preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." (81 Cong. Rec., July 30, 1937 at 7876). However, even in this limited form, the legislators were not willing to define the exemption precisely. The Schwellenbach amendment, it will be noted, exempted such handlers where the commodities processed came from the "area of production". Upon inquiry, by Senator Black, Senator Schwellenbach said his amendment would not apply to a cannery. Upon further inquiry by Senator Black, Senator Schwellenbach was unable to state definitely what was meant by the word "area" used in the exemption. (81 Cong. Rec., July 30, 1937, at 7878). When the bill reached the House, a more comprehensive amendment with respect to "area of production" was introduced by Congressman Biermann. He proposed to enlarge the exemption to include such processes as canning. Mr. Biermann urged that *small* establishments engaged in processing such as canning be exempted. It was made plain in the debates, both in the Senate and the House, that the Congressmen felt that *small neighborhood* processing establishments operated by the farmers and for the farmers, but not industrial establishments operating for profit, should be exempted. 83 Cong. Rec., May 23, 1938, at page 7326, and 83 Cong. Rec., May 24, 1938, at 7402. The Senate's Schwellenbach amendment was, thereupon amended by the House by adoption of a further amendment known as the Biermann amendment to include canning. This amendment was finally incorporated in the Act as Section 13 (a) (10).

It can be argued that, since the cost of processing and

canning the citrus fruit is charged back by the cannery to the farmer, the effect of raising the wages of cannery operatives is to reduce the income of the farmer and that, therefore, the intent of Congress to exempt the farmer is not carried out by a definition making the Act apply to the workers in a large cannery. However, that argument is specious. The cannery workers *are* industrial not farm labor. Moreover the argument can be extended *ad absurdum* by causing it to apply to transportation companies and auction markets, the cost of transportation and sale of fruit being deducted from the farmer's returns on his fruit. We suggest that, after the fruit has passed out of the farmers control into the control of large commercial industrial establishments, such as the defendant's establishment, the general coverage of the Act, and not the farmers' exemption ought to apply. That is how the Administrator seems to have construed the intent of Congress.

HEARINGS BY ADMINISTRATORS WITH REFERENCE TO FORMULATION OF DEFINITION.

Several successive administrators have devoted considerable time and study to the problem of determining what should be a proper definition of the phrase "area of production" as used in Section 13 (a) (10) of the Act. Careful study and thorough understanding of the conditions in the numerous industries concerned were necessary to avoid a definition which would cause unjustified competitive inequalities and grave economic dislocations. In the period from October 20, 1938, to October 6, 1941, eight definitions or amendments were promulgated. Each of these was published in the Federal Register before its effective date.[1] Numerous conferences with the United

[1] 3 F. R. 2536, (October 22, 1938); 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 1476 (March 18, 1941) and 6 F. R. 5165 (October 11, 1941).

States Department of Agriculture experts were held and many representatives of industry and labor were consulted. Extensive hearings, both formal and informal, were conducted upon the application of various industries. Representatives of the fresh fruits and vegetable industries were heard at length. See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: General hearings, Reference Nos. 162a (4 vols.), 72 (1 vol.); on fresh fruits and vegetables, Reference Nos. 54 (4 vols.), 73 (2 vols.), 162b (3 vols.), 162c (3 vols.). Twenty-four volumes containing more than 4,000 pages were taken at the formal hearings alone. The definition in issue here was adopted after thorough consideration of many other possible definitions.

DEFENDANT'S DILEMMA.

Either

A. *In promulgating his several definitions of the phrase "area of production", the Administrator applied in a just and reasoned manner the sufficient standards set up for his guidance in the Act*

Or

B. *There is no exemption because the Administrator has failed properly to perform the duty delegated to him to define said phrase and the exemption does not exist.*

In case A above is true, plaintiffs are not excepted from the coverage of the Act because admittedly there were more employees of defendant's establishment than the Administrator's definition allowed and defendant's establishment did not secure all of its commodities from the "immediate locality" or "general vicinity" of the establishment as such phrases were defined by the Administrator.

In case B above is true the plaintiffs are not excepted from the coverage of the Act because the exception provided for in Section 13 (a) (10) has never been given effect and, therefore, the employees in defendant's establishment are within the Act.

We hold with A above, and purpose to demonstrate that it is true. However, if we fail, B must be true, which is likewise cold comfort for the defendant.

PRINCIPLES TO BE APPLIED IN TESTING VALIDITY OF ADMINISTRATOR'S DEFINITIONS.

In order for the Administrator's definition of "area of production" to be valid, the Act must set up sufficient standards for the guidance of the Administrator and the Administrator must apply those standards in a just and reasoned manner.[2]

In the case of *Opp Cotton Mills* v. *Administrator*, *supra*, it was held that the Fair Labor Standards Act sets up sufficient standards for the guidance of the Administrator to enable him to fix minimum wages. This Act sets up the same standards for his guidance in defining the phrase "area of production" for the purpose of the exemption allowed by Section 13 (a) (10) of the Act.

The cases hold:

(1), so long as a policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which

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[2] *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Division of the Department of Labor* (1940), 312 U. S. 126-156, 85 L. Ed. 624. Opinion by Mr. Justice (now Chief Justice) Stone;
Gray v. *Powell* (1941), 312 U. S. 402-423, 85 L. Ed. 301, Opinion by Mr. Justice Reed;
A. L. A. Schechter-Poultry Corp. v. *U. S. A.* (1935), 295 U. S. 495-555, 79 L. Ed. 1570. Opinion by Mr. Chief Justice Hughes, Headnotes 3 and 4.

the policy as declared by the legislature is to apply (*Schechter* case, *supra*); and

(2) In a matter left specifically by Congress to the determination of an administrative body, as is the question of exemption here, the function of review placed upon the courts is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body and an application of the statute in a just and reasoned manner (*Gray* v. *Powell, supra; Shields* v. *Utah*, 305 U. S. 117, 83 L. Ed. 111).

CONGRESS ANNOUNCED A POLICY AND SET UP SUFFICIENT STANDARDS FOR THE ADMINISTRATOR TO FOLLOW.

The policy of the Fair Labor Standards Act of 1938, as set forth in Section 2 of Act (29 U. S. C. A. 202), is to correct and, as rapidly as practicable, to eliminate the substandard labor conditions in industries engaged in commerce or in the production of goods for commerce which cause commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such substandard labor conditions, burden commerce, constitute an unfair method of competition in commerce, lead to labor disputes, and interfere with the orderly and fair marketing of goods in commerce.

The District Judge, in our case, found that the Administrator held hearings to determine the definition to be given for "area of production." (R. 188).

The illuminating opinion of Judge Yankwich in the case of *Redlands Foothill Groves* v. *Jacobs* (Dist. Ct. of California, January 5, 1940), 30 Fed. Supp. 995, at second column, 1002, recites that the Administrator summoned an advisory board of the citrus industry to advise on matters relating to the "area of production". The committee recommended a definition of the phrase to which certain interested parties objected. Hearings were had before the Ad-

ministrator, who, disregarding both the recommendation of the Committee and the protest of the objectors, finally approved the definitions that he promulgated.

The above procedure conforms to the provisions of the Act and complies with all reasonable requirements of the "due process" clause of the Constitution.

IN DEFINING THE PHRASE "AREA OF PRODUCTION" THE ADMINISTRATOR APPLIED THE POLICY AND FOLLOWED THE STANDARDS IN A JUST AND REASONED MANNER.

That the Administrator framed his definitions in a just and reasoned manner to advance the purpose of the Act is clear from the recitals in the preamble to the Administrator's first definition, namely, the regulation of October 20, 1938 (Section 536.2) which reads:

> "It appearing that the intent of Congress in making the special provisions relating to the 'area of production' was to prevent undue disturbance to agriculture and to exempt small businesses closely related to agriculture to employ occasional workers in addition to members of employer's family without regard to the Wage and Hour Standards of the Act; and
>
> "It appearing that the exemption of only those businesses which employ a small number of workers would not result in material inequities between firms doing the same type of business; and
>
> "It appearing that such small businesses are predominantly located in the 'open country' or 'rural communities' receive most of their raw products from neighboring farms, and frequently employ workers who spend part of their time in actual operations; and "it appearing that the exemption herein granted to such small businesses would not defeat the declared purposes of the Act; therefore, in view of the foregoing * * *"
>
> (From preamble to Administrator's Regulation of October 20, A. D. 1938, Section 536.2.)

True, in framing his definitions, the Administrator has departed from the dictionary definition of "area", but the Congress in giving him the power to define "area of production" did not circumscribe the mode of its exercise (*Redlands* case, *supra*, at page 1004). When regulating employment, size has been considered a constitutionally valid criterion (*Id.* and *Miller* v. *Wilson*, 1915, 236 U. S. 373, 382-4, 59 L. Ed. 628.) Size as determined by number of employees is also a proper criterion (*Id.* and *St. Louis Consolidated* v. *Illinois* (1902), 185 U. S. 203, 46 L. Ed. 872; *Carmichael* v. *Southern Coal* (1937), 301 U. S. 495, 81 L. Ed. 1245).

The Act itself defines "agriculture" 29 U. S. C. A. Sec. 203 (f) and exempts employees employed in agriculture as so defined 29 U. S. C. A. Section 213 (6) as well as individuals employed within the "area of production (as defined by the Administrator", engaged in canning agricultural or horticultural commodities for market. 29 U. S. C. A. Sec. 13 (a) (10).

The debates in Congress on the passage of the Act to which the Administrator could repair upon the meaning and intent of Congress in allowing said last mentioned exemption showed that that purpose of Congress was fundamentally to cover all industrial labor, and to exempt the farmer from the burden of complying with the wage and hour provisions of the Act.

Therefore, it was reasonable for the Administrator to define the phrase "area of production" as he did, so as to exempt the small neighborhood canning establishment and so as to include large canning establishments operated not by the farmer and his help, but by sub-standard industrial labor, and for profit.

There Could Not Be Any "Area of Production" Exemption in the Absence of a Valid Definition.

Our argument that Congress properly delegated the authority to the Administrator to define the phrase "area of production" is based upon the premise that the Act provided proper and sufficient standards to govern the Administrator in exercising this authority. It is noteworthy that none of the 21 cases dealing with the validity of the Administrator's definition holds that the Act does not prescribe sufficient standards. If our said premise is sound, and the Act does set up satisfactory standards to guide the Administrator in his delegated task, then the only attack upon his definitions must be that he did not apply these standards in a just and reasonable manner. If this premise is not sound, then the authority was unlawfully delegated and the exemption provided for in the Act does not exist. If the latter alternative be so, then certainly the Administrator's definitions are not valid, in which case there is no valid definition and, therefore, no exemption.

Assuming that the Administrator's definitions of "area of production" were wrong, the defendant cannot claim exemption under it until the Administrator redefines the phrase so as to exclude defendant's establishment. As the power is given to him alone, no court can redefine for him.[3]

There could not be any "area of production" exemption in the absence of a valid definition. The Administrator's exclusive authority to define "area of production" was recognized by the Court of Appeals (R. 228), and indeed it is doubtful that any such legislative power could have been conferred on Federal courts. *Federal Radio Com-*

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[3] *Redlands* case, supra, at page 1096, citing *Proctor & Gamble* v. *United States* (1912), 225 U. S. 282, 297-300, 56 L. Ed. 1091; *Adams* v. *Nagle* (1938), 303 U. S. 532, 543, 82 L. Ed. 899; *Hegeman Farms* v. *Baldwin* (1934), 293 U. S. 163, 79 L. Ed. 259; *Shields* v. *Utah etc. Ry. Co.* (1938), 305 U. S. 177, 181, 83 L. Ed. 111.

mission v. *General Electric Co.*, 281 U. S. 464, 466; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275-276. The language of section 13 (a) (10) in itself affords no exemption from the wage and hour provisions. Literally, only when supplemented by the Administrator's definitions does the exemption become operative. Thus it would seem that a valid definition by the Administrator is prerequisite to the existence of the exemption.

THERE IS A CONFUSION IN THE CASES REGARDING THE VALIDITY OF THE ADMINISTRATOR'S DEFINITION.

Some twenty-one cases in the lower federal courts deal with the Administrator's definition.[4]

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[4] *Redlands Foothills Groves* v. *Jacobs*, 30 Fed. Supp. 995, Yankwich, Judge. Decided January 5, 1940.

Janes v. *Lake Wales*, C. C. A. 5, Sibley, Judge. 110 Fed. (2nd) 653. Decided March 15, 1940.

Fleming v. *Farmers Peanut Co.*, Deaver, Judge. 37 Fed. Supp. 628. Decided March 1, 1941.

Oscar Caliup v. *Terrell Cotton Warehouse Company*, decided May 29, 1941, Dallas District Court, Texas. Oral opinion.

Cedell Clark v. *Jacksonville Compress Company*, Bryant, Judge. 45 Fed. Supp. 43, Tyler Division, Texas. Decided November 22, 1941.

Gordon v. *Paducah Ice Manufacturing Company*, Judge Miller, 41 Fed. Supp. 980, W. D. Ky. Paducah Div. Decided Nov. 16, 1941.

Remington v. *Shaw, doing business as Shaw Feed and Elevator Company*, Western District of Michigan, 5 Wage and Hour Reports 83, Raymond, Judge. Decided January 12, 1942.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88, District Court, S. D. of Texas, Corpus Christi Div., Kennerly, Judge. Decided April 16, 1942.

Dean Cox v. *Swift & Company*, District Court, N. D. of Texas, Ft. Worth Div., Wilson, Judge. Decided April 25, 1942.

Jesse Carpenter v. *Waxahachie Cotton Warehouse et al.*, Texas Court of Civil Appeals, Hale, Judge. Decided April 30, 1942.

Fleming v. *Farmers Peanut Co.*, C. C. A. 5, 128 Fed. (2nd) 404, Sibley, Judge. Decided May 25, 1942.

Abram v. *San Joaquin Cotton Oil Co.*, S. D. California, 5 WHR 594, 46 Fed. Supp. 960, O'Connor, Judge. Decided June 3, 1942.

There is no definite trend of policy in these decisions of the Courts which have passed upon the question of the validity of the Administrator's definition of "area of production" unless it is that, since the decision in the case of *Fleming* v. *Farmers' Peanut Company*, C. C. A. 5, 136 Fed. (2nd) 404, which was the first decision on the point by a Circuit Court of Appeals, there has been a trend in the later decisions of the various District Courts to base their rulings on the authority of that case. All of the other cases, included in our foregoing list, are district court cases. Some of these cases held that the number factor is appropriate—more, that it is not. Some of them cast the Administrator's definition wholly aside as arbitrary and capricious. Others of them, including the decisions of the Court of Appeals, in the case of *Fleming* v. *Farmers Peanut Company*, after eliding the number factor from the Administrator's defini-

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Gaskin v. *Clell Coleman & Sons*, Ky. Ct. Ct. Mercer County, Alcorn, Judge. Decided June 19, 1942.

Byus v. *Traders Compress Company*, Western District of Oklahoma, 6 WHR 66, Broaddus, Judge. Decided October 19, 1942.

Phillip B. Fleming, Admr. (Walling) v. *Lincoln Loose Leaf Warehouse Company*, Eastern Dist. of Tenn., Winchester Div., 5 WHR 615, Darr, Judge. Decided 1942.

Walling v. *McCracken County Peach Growers Assn.*, 6 WHR 718, W. D. Ky., Miller, Judge. Decided June 15, 1943.

Shain v. *Armour & Company*, W. D. Ky., 6 WHR 715, Miller, Judge. Decided June 17, 1943.

Rafael Bruno v. *The Hill Bros. Company of P. R.*, not yet reported, District of Puerto Rico, Cooper, Judge. Decided August 20, 1943.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor v. *The Peacock Corp.* Decided July 23, 1943. U. S. District Court, Eastern District of Wisconsin.

Oscar Holt and William R. Dahl, Plaintiffs, v. Barnesville Farmers Elevator Company, Defendant, U. S. District Court for the District of Minnesota, Sixth Division, Nordbye, Judge. Decided September 13, 1943.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, v. *Home Loose Leaf Tobacco Warehouse Co., Inc., Defendant.* District Court for the Eastern District of Kentucky. Opinion by Ford, Judge. Decided October 9, 1943.

tion, gave lip service to the remainder of the Administrator's definition, but actually rewrote the remainder of the Administrator's definition, greatly to enlarge the distance element in the Administrator's definitions in Regulation 536.2 of his sub-phrases "immediate locality" or "general vicinity".

Most of the Courts holding that the Administrator's definition must fall, nevertheless hold that the courts must allow the exemption, if they deem the defendant to fall within it. However, the *Redlands* case, *supra*, holds that, if the Administrator's definition is invalid, no exemption exists because the Congress has confided to the Administrator alone the power to define the exempting phrase. We regard this last as the sound view. Moreover, we suggest that this view is particularly applicable where it is not the Administrator (who should have validly defined the exemption) that seeks relief, but, as in our case, employees who will be deprived of their relief if, though the Administrator's definition is invalid, the exemption is nevertheless allowed. The plaintiffs are not seeking prospective relief. They seek to recover wages due them for past periods of time. They had nothing whatever to do with whether the Administrator allowed the exemption or properly exercised his power to define.

Distinctions Between Our Case and the Case of Fleming v. Farmers Peanut Co. Supra.

The case of *Fleming* v. *Farmer's Peanut Company*, C. C. A. 5th, 128 Fed. 404, upon which the Court of Appeals based its ruling in our case, cast out the Administrator's number factor, and disregarded his limiting definitions for his sub phrases "immediate locality" and "general vicinity." It ruled that "general vicinity" was larger than "immediate locality" and that "general vicinity" *excluded distance be-*

yond the range of usual farm travel. It then found the Farmers Peanut Company to be within the exemption of Section 13 (a) (10) of the Act because the commodities processed, which were brought to the defendant's establishment by the farmers themselves, 37 Fed. Supple. 628, came from within the range of usual farm travel.

In our case the District Judge found that an appreciable portion of the fruit processed at defendant's establishment came from beyond the range of usual farm travel.

In this *Farmers Peanut* case, the Administrator was seeking injunction against future violations of the Act. In disposing of the Administrator's definition, Judge Sibley said: "We, therefore, have not a case where the Administrator has failed altogether to define. But if we ought to hold the entire definition void, we say that a failure to define would not enable the Administrator to prevail. It may be that the court cannot define for him but it should withhold its aid in the effort to over-ride the exception which needs his definition until he meets the need lawfully. To do otherwise would be to flout the expressed will of Congress."

If the Administrator's definition was not good the Court of Appeals was right in the *Farmers Peanut* case in denying him relief by injunction because, if he had failed properly to define "area of production", he could not, with clean hands, insist that the defendant was not exempt, because he had failed to exempt it, when he should have done so.

In our case, the plaintiffs are mere employees. If the Administrator has made no valid definition of "area of production" which would exempt defendant, the plaintiffs are not at fault. They do not seek such prospective relief as injunction against further violations of the Act. They seek damages. Either they earned their wages for which they sue and can recover them, or they did not earn them and cannot recover them.

THE HOLDING OF THE COURT OF APPEALS IN OUR CASE WAS CONTRARY TO ITS HOLDING IN THE FARMERS PEANUT CASE, SUPRA.

What the Court of Appeals held in our case is:

"The Administrator must define fairly and truly the 'area of production', but he cannot create such area, or arbitrarily limit it within false and artificial boundaries. On the other hand, this court should not attempt either to legislate or to define the "area of production", but only to declare the law applicable to the facts before it, aided by the Administrator's definition, and striking down invalid portions thereof only to the extent that may be necessary in order correctly to dispose of the case." (R. 227 & 228.)

Thereupon, contrary to the District Judge's findings that an appreciable portion of the agricultural and horticultural commodities processed at the defendant's establishment came from beyond the range of usual farm travel (R. 192), and contrary to its own limitation of the phrase "general vicinity" to "range of usual farm travel" as expounded in the *Farmers Peanut* case, supra, the Court of Appeals said: "Considering the facts of this case with reference to the location of appellant's plant, it seems to us fairly certain that all of the citrus fruit processed therein came from the 'area of production' as defined by the Administrator". (R. 228.)

THE COURT OF APPEALS SHOULD NOT HAVE INVALIDATED A PART OF THE ADMINISTRATOR'S DEFINITION AND USED THE REMAINDER AS THIS AMOUNTED TO REWRITING THE ADMINISTRATOR'S DEFINITION.

Another question is whether it was proper for the court below, which had no power of definition, to apply a portion

of the Administrator's definition after invalidating the remainder. The Administrator provided that both the numerical limitation standard and the general vicinity test be satisfied. Even in the absence of extrinsic evidence, it would appear sufficiently clear that a definition in terms of only one of these conditions does not carry out the Administrator's purpose. The "general vicinity" test standing alone, which would exempt some plants with 200 or more employees, would obviously produce a result different from that contemplated by the definition as a whole. That the portion of the definition applied by the court below does not represent the purport of the Administrator's definition is affirmatively evidenced by the Administrator's abandonment of alternative definitions without the numerical limitation which had been incorporated in earlier Regulations. One of the definitions abandoned as impracticable provided that an establishment was in the "area of production" if it received products from the immediate locality and was located in the open country or a rural community.

Where the parts of an administrative definition are mutually dependent upon one another, and the effect of the definition would be substantially changed by invalidating only a portion, it would seem appropriate to apply to such subordinate legislation the same principle which forbids "the mutilation of a statute." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312-313. In applying only part of the integrated definition, the Court of Appeals, in effect, provided its own definition; thereby exercising a legislative function. It is believed that the only appropriate scope of judicial action was to hold the entire definition valid or invalid.

When the Court of Appeals Threw Out the Administrator's Definition, It Also Should Have Thrown Out the Claimed Exemption. In Rewriting the Administrator's Definition the Court of Appeals Exceeded the Permissible Limits of Judicial Review.

We submit that while the courts may review the propriety of the Administrator's definition of "area of production" that review must be limited to the questions, (1) whether the Administrator has given a hearing to interested parties, (2) whether in arriving at his determination he had departed from the applicable rules of law, and, (3) whether his definition has a basis in substantial evidence or was arbitrary and capricious. These questions must be determined upon the evidence produced before the Administrator. *Shields* v. *Utah, supra.* The burden of showing the Administrator's failure in any of these respects is upon the defendant who claims the exemption. The exemption is to be construed strictly and the defendant must literally come within it to be entitled to claim it. If the courts find that the Administrator has not validly executed his delegated power, the exemption does not exist. The courts cannot reconstruct the Administrator's definition for him for the Congress has delegated the power to define to him and not to the courts. Since the Court of Appeals found that the Administrator's definitions involved were invalid, the exemption was not available for defendant. In re-writing the Administrator's definitions to fit its own notions, the Court of Appeals exceeded the permissible limits of judicial review of administrative action.

This is so because although Section 10 (a) of the Act seemingly provides for judicial review of an administrative wage order, there is no provision of the Act that there shall be any judicial review of the Administrator's power to define the exemption here involved. We do not undertake

to say that, to the extent of determining whether or not Congress has unlawfully delegated its legislative function to the Administrator in regard to the exemption provided in Exemption 13 (a) (10) of the Act, and to the extent of determining whether or not the Administrator has abided by the standards fixed by the Act for his guidance in allowing the exemption, the Courts may not review the Act and the Administrator's exercise of discretion pursuant thereto with reference to such exemption.

It is submitted, however, that the Court of Appeals clearly exceeded the proper scope of judicial review of administrative action which is legislative in character. Even where review is provided by statute, this Court has ruled that broad scope must be given "the discretion and informed judgment of an expert administrative body" in adopting regulations. *Federal Security Admr.* v. *Quaker Oats Co.*, 318 U. S. 218; *Gray* v. *Powell*, 314 U. S. 402, 411, 413. An administrator's legislative determinations under the statute should not be disturbed if "his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made." 318 U. S. at 233. Thus the decision below is equivalent to a finding that no rational person could have prescribed the standard in question here, *despite the fact that several successive administrators had adopted it.*

The additional cases cited in the foot-note also support our claim that the Court of Appeals on the appeal in our case exceeded the proper scope of judicial review of administrative regulations and orders.[5]

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[5] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139-140; *Federal Communications Comm.* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 143-44; *United States* v. *Morgan*, 313 U. S. 409, 422; *Houston* v. *St. Louis Independent Packing Company*, 249 U. S. 479, 484; *Burnet* v. *S. & L. Building Corporation*, 288 U. S. 406, 415.

APPLICABILITY OF CLAIMS OF PARTIAL EXEMPTION SET UP BY THE DEFENDANT UNDER SECTIONS 7 (B) (3) AND 7 (C) OF THE ACT.

In its Third Defense the defendant set up a claim of partial exemption from the overtime provisions of the Act for fourteen weeks in a calendar year (R. 10-12), under section 7 (b) (3) of the Act. In its Fourth Defense the defendant set up a claim of fourteen weeks exemption in a calendar year from the overtime provisions of the Act under section 7 (c) of the Act (R. 12-13).

In its order of January 26, A. D. 1943, the District Court (R. 198) held that the defendant was not entitled to either of these exemptions. Because it found the defendant totally exempt as to minimum wages and over-time under section 13 (a) (10), the Court of Appeals did not deal with the validity of either of these claims to partial exemption. However, to make a proper disposition of this case, both of these claims of partial exemption should be disposed of.

The canning of citrus fruit was not determined by the Administrator to be of seasonal nature until August 24, 1940. (See Administrator's Determination of Seasonality of the Fresh Fruits and Vegetable Industry 5 F. R. 3167. This date was after the expiration of both of the citrus canning seasons involved in this suit.

To establish the invalidity of these two claimed exemptions, we simply rest our case on the findings of the District Court, as set forth in his order of January 26, 1943 (at R. 199-201) as follows:

"The Court finds that Section 7 (b) (3) merely relates to exemption from paying compensation for overtime employment and that in order for the defendant to be entitled to a claim of exemption under said section 7 (b) (3), the industry must have been found by the Administrator to be of a seasonal character. The Court further finds that the

Administrator did not find the citrus industry to be of a seasonal nature until August 24, 1940, which was a date subsequent to all dates and periods in controversy here. (See Federal Register of August 24, 1940.)

"With further reference to said exemption as set forth in the Third Defense of the original answer filed by the defendant under section 7 (b) (3) the Court is of the opinion that said exemption did not exist until such finding by the Administrator and that the finding could not be retroactive. Consequently, the right of the defendant to claim this exemption under Section 7 (b) (3) is disproved by the Third Defense in which said claim is made.

"The Court finds that this exemption (Section 7 (b) (3) is only available to the defendant if the defendant has paid its employees compensation at the rate of not less than time and a half the regular rate at which they were employed for a period or periods of more than 12 hours in any work day and not less than 56 hours in any work week and the Third Defense does not set up that the employer, namely, the defendant herein, has complied with this condition of the said partial exemption claimed.

"Therefore, the Court finds that the Third Defense which claims a partial exemption of 14 weeks under section 7 (b) (3) of the said Act is insufficient in point of law.

"With reference to the amended Fourth Defense which claims a 14 week partial exemption under Section 7 (c) of the said Act, the Court finds that this applies to a period or periods of not less than 14 work weeks in the aggregate in any calendar year in the canning of perishable or seasonal fresh fruits and vegetables or in the first processing within the "area of production" as defined by the Administrator of any agricultural or horticultural commodities during the season's operations. It does not appear from the Fourth Defense that the defendant at any time prior to

the institution of this suit designated any period or periods of not more than 14 weeks in the aggregate in any calendar year involved in the controversy. In fact, the Fourth Defense does not deny, and, therefore, admits the charges of the complaint as amended that the defendant violated the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938, apparently relying upon a claim of total exemption under Section 13 (a) (10). Any claim to said partial exemption allowed by Section 7 (c) is inconsistent with a claim of total exemption under Section 13 (a) (10), such as is pleaded in the amended Fifth Defense. Moreover, since employment is a matter of contract, it is reasonable to construe the designation of the particular fourteen work-weeks to be exempted to be a matter for agreement between the employer and the employee, and the Fourth Defense does not aver any such joint designation. Moreover, the employer may elect to claim the partial exemption allowed by Section 7 (c) where applicable and where the employer, as here, appears to have settled with the plaintiff for the weeks worked during the two seasons in controversy, without claiming the partial exemption under Section 7 (c), it is not now entitled to re-open the account and claim same now.

"Therefore, the Court finds that the defendant is not entitled to the partial exemption claimed in the Fourth Defense on account of its canning operations or on account of the first proceeding within the area of production as defined by the Administrator."

(District Court Findings—R. 199-201).

The Court of Appeals did not disturb these findings.

In any event, neither of these two partial defenses is good, and the Section 7 (b) (3) exemption must be based on a prior finding by the Administrator of the seasonality of the industry. Such a finding was not made by the Administra-

tor until after the period in controversy in this case had passed.

Therefore, if the Court of Appeals is reversed, the final judgment by the District Court should be affirmed, without remand for further proceedings.

Conclusion.

As will be seen at R. 212, the final judgment of the District Court was entered up on the basis that none of the defendant's defenses was sufficient, all having been stricken, save and except the second defense, which defense had been waived by the defendant as to the claim of the plaintiffs.

Therefore, if the District Court was right in striking the defendant's third defense, claiming a partial exemption from overtime under Section 7 (b) (3) and the defendant's fourth defense claiming a partial exemption from overtime under section 7 (c) of the Act, and defendant's amended fifth defense claiming a total exemption from the minimum wage and overtime provisions under Section 13 (a) (10) of the Act, there remains nothing further for the Court of Appeals or the District Court to do, and the final judgment of the District Court ought to be sustained without a remand for further proceedings.

Respectfully submitted,

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